

OFFICE MEMORANDUM

TO: Board of Environmental Review

FROM: David M. Rusoff, DEQ Staff Attorney

SUBJECT: House Bill 311 review for amendment and adoption of rules pertaining to restriction of emissions of mercury from coal-fired power plants, MAR No. 17-246

DATE: October 13, 2006

House Bill 311 REVIEW
(Assessing Impact On Private Property)

Sections 2-10-101 through 105, MCA, codify House Bill 311, the Private Property Assessment Act, from the 1995 Montana Legislature, by requiring that, prior to taking an action that has taking or damaging implications for private real property, a state agency must prepare a taking or damaging impact assessment. Under Section 2-10-103(1), MCA, "action with taking or damaging implications" means:

a proposed state agency administrative rule, policy, or permit condition or denial pertaining to land or water management or to some other environmental matter that if adopted and enforced would constitute a deprivation of private property in violation of the United States or Montana constitution.

Section 2-10-104, MCA, requires the Montana Attorney General to develop guidelines, including a checklist, to assist agencies in determining whether an agency action has taking or damaging implications.

The present action involves adoption of rule amendments and new rules affecting use of private real property, and the Board has discretion legally not to take the action, although EPA will implement its Clean Air Mercury Rule in the state if the state does not submit a state plan that is approved by EPA. So, I completed an Attorney General's Private Property Assessment Act Checklist, which is attached to this memo. The rule amendments and new rules being adopted by the Board would not:

- * result in either a permanent or indefinite physical occupation of private property;
- * deprive any owner of all economically viable uses of private property;

- * deny a fundamental attribute of private property ownership;
- * require a private property owner to dedicate a portion of property or grant an easement;
- * have a severe impact on the value of private property; or
- * damage private property by causing a physical disturbance with respect to the property in excess of that sustained by the public generally.

Based upon completion of the attached Attorney General's Checklist, the rulemaking does not have taking or damaging implications, and no further House Bill 311 assessment is required.

Enc.

DMR